IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 13872 of 2004

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

KALUBHAI JODHABHAI KHASIA

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 13872 of 2004

MS BANNA DUTTA for MR DM THAKKAR for Petitioner No. 1

MS HANSA B PUNANI AGP for Respondent No. 1-3

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 01/02/2005

ORAL JUDGEMENT

1. This Special Civil Application under Article 226 of the Constitution of India has been filed by the

petitioner challenging his detention in pursuance of the order passed against him by District Magistrate, Bhavnagar, on 05th of August, 2004, in exercise of powers conferred upon him under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (PASA Act for short). The petitioner is under detention as bootlegger from 06th of August, 2004 in pursuance of the above order.

2. The grounds of detention as placed on record reveal that the detaining authority took into consideration two types of materials to arrive at the subjective satisfaction. Firstly, the fact of filing five cases against the petitioner under the Bombay Prohibition Act and three in-camera statements of the witnesses, whose identity is not disclosed claiming privilege under Section 9(2) of the PASA Act.

3. Out of 5 criminal cases registered against the petitioner under the Bombay Prohibition Act, four cases are registered before Jesar Police Station and one before Palitana Town Police Station of Bhavnagar District. Five cases are registered on 11th of August, 2003, 11th of August, 2003, 30th of August, 2003, 20th of February, 2004 and 13th of June, 2004. In all the five cases, the petitioner is on bail though the cases are pending. As per the allegation, in all the five cases, the petitioner was found in possession of prohibited liquor of some quantity. The detaining authority also took into consideration the tree in-camera statements as recorded by the Police Sub-Inspector, Bhavnagar, LCB Police Station, on 24th of July, 2004, verified by Deputy Superintendent of Police on 30th of July, 2004 and verified by the detaining authority on 4th of 2004. First two witnesses referred to the incident occurred 30 to 40 days before recording of their statements. At about 10.00 p.m. the witness was present at his business place, at that time, the petitioner approached him and asked the witness to take out his vehicle for transporting of country liquor. On refusal by the witness, the petitioner was excited and started giving abuses to the witness. When the witness tried to prevent the petitioner, he was further excited and after pulling an iron chain, started beating the witness. On shouting by the witness, a crowd was gathered. Therefore, the petitioner rushed towards the crowd with a chain in hand, so persons were heltered - skeltered and shops were closed. The area was terror stricken and when witness tried to escape in his vehicle, the petitioner through the blows of chain, damaged the headlight of the vehicle of the witness. The second witness referred to the

incident occurred before 15 days of recording of statement of the witness. The witness was present at his business place and the petitioner approached him along with his two accomplices. The petitioner demanded an amount Rs. 10,000/- from the witness for deferring the expenses of prohibited liquor which was to be delivered to the petitioner. Witness refused to give money to the petitioner, so the petitioner started abusing the witness. The witness attempted to prevent the petitioner but the petitioner got excited and started beating the witness. The witness shouted for the help so the persons having shops around this place, gathered there, but the petitioner took out a knife from his pant and ran towards the crowd of persons gathered at that place. The witness thereafter was got hold the petitioner and was threatened that if the witness filed any complaint before the police, he would be done to death. Due to fear of the petitioner, witness did not report this incident before police. The third witness referred to an incident occurred before about 7 days of the recording of the statement of the witness. At that time, at about 9.00 p.m. witness was going to his house from his place of business, he was accosted by the petitioner and was threatened that witness was providing information to the Police about illegal activities of the petitioner in dealing prohibited liquor. The witness denied to have provided any information to the police. The petitioner was excited and started beating the witness. On shouting, passersby and other vehicle drivers gathered around the place, but the petitioner with gupti rushed towards the crowd, so the crowd of persons was dispersed. In the meantime, the witness could escape and saved himself.

4. From the above material, the detaining authority came to the conclusion that the activities of the petitioner was prejudicial to the maintenance of public order and was adversely affecting the public life. The detaining authority came to the conclusion that the petitioner was headstrong person and was possessing ferocious tendencies and was picking up quarrels with innocent citizens. The detaining authority also came to the conclusion that the petitioner for his illegal activities demanded amounts from innocent citizens and whoever became obstruction to the illegal activities of the petitioner was beaten by the petitioner and his accomplices. The detaining authority also came to the conclusion that the bootlegging activities of the petitioner were required to be prevented forthwith. After considering other remedies available against the petitioner under general law, the detaining authority

came to the conclusion that there was no other alternative except to pass the order of detention of the petitioner under the PASA Act to prevent his bootlegging activities forthwith. Therefore, the detaining authority passed the order of detention of the petitioner which is under challenge in this petition.

5. Learned Advocate Ms. Banna Dutta for learned Advocate Mr. D.M. Thakkar for the petitioner and learned AGP Ms.Hansa B Punani for the respondents were heard at length. Affidavit-in-reply filed by the detaining authority and as placed on record by learned AGP, is also taken into consideration.

6. Out of various grounds urged on behalf of the petitioner and controverted and opposed by learned AGP it appears that this petition can be examined and disposed of only on the sole issue that whether there was credible material placed before the detaining authority to come to the conclusion that by the activities of the petitioner the public order was disturbed and public health was adversely affected.

7. To arrive at the subjective satisfaction that bootlegging activities of the petitioner were prejudicial to the maintenance of public order and public health, the detaining authority must rely upon credible and cogent material indicating that the activities of the petitioner directly or indirectly were causing or were likely to cause any harm, danger or alarm or feeling of insecurity among the general public or any section thereof or a grave or widespread danger to life, property or the public health. While undertaking this exercise, the detaining authority must draw a clear line between the cases falling within breach of law and order and breach of public order. The fall out, reach and impact of the activities of the petitioner determines whether potentiality of the activities alleged was capable of disturbing the public order. When reach and impact of the activities are so grave, as to affect larger section of society and when widespread danger to life, property or the public health is likely, the activities can be branded as activity affecting the public order. The other cases are cases falling within the scope of breach of law and order and can be taken care of by the general law. Now referring to the material as relied upon by the detaining authority, in this case, it is clear that the detaining authority has gone through the investigating papers in five criminal cases registered against the petitioner. Out of which, three cases are registered in August 2003 while other two cases are

registered in February 2004 and June 2004. Allegation in these cases are that the petitioner was found in possession of some prohibited liquor in breach of the Bombay Prohibition Act. These cases are pending and the petitioner shall be tried and may be punished if found guilty, but nothing is revealed through the investigating papers of these five cases that such activities of the petitioner were prejudicial to the maintenance of public order or adversely affecting the public health. At the most, these cases may be considered to be breach of law and for which, as aforesaid, the petitioner may be dealt with according to law. Therefore, the act constituting criminal offences registered against the petitioner in dealing with foreign liquor have no bearing at all on the question of maintenance of public order. The subjective satisfaction arrived at by the detaining authority from this material is not legal, valid and in accordance with law.

8. Secondly, the detaining authority also relied upon three incamera statements, as narrated above. While going through those statements and taking them on their face value, it is clear that the fall out, reach and impact of the activities of the petitioner were not capable of disturbing the public order. The incidents referred in three in-camera statements appear to be more individual disputes than to involve society at large or disturbing the even tempo of the life of the community. The potentiality of the acts alleged in in-camera statements, from the bare reading, do not disclose the impact to disturb the even tempo of the life of the community or society at large or section of the society. No widespread danger to society could be inferred from the statements of the witnesses and, therefore, those unreported incidents are also may be affecting breach of law and order, but cannot be branded to be the activities prejudicial to the maintenance of public order and affecting adversely the public health.

9. In the matter of Ashokbhai Jivraj @ Jivabhai Solanki Vs. Police Commissioner, Surat & Ors., reported in 2000 (1) G.L.H. 393, wherein after considering many decisions of the Apex Court, the Division Bench of this Court has observed in paragraphs No.21 and 22 as under.

> "21. The Division Bench, following the above cases, observed that in the opinion of the Supreme Court, the selective phrases in the statements would not take out the case from maintenance of law and order to that of maintenance of public order and as power of detention could not be used for maintenance of

law and order, but only for public order, the order of detention made in such circumstances could not be upheld.

Again, in Mustakmiya Jabbarmiya Shaikh v. M.M.Mehta, Commissioner of Police and others, 1995 (2) GLR 1268 (SC), the Supreme Court considered the relevant decisions on point including the decision in Arun Ghosh v. State of West Bengal, 1979 (1) SCC 98 and held that stray incidents would not affect "public order" and order of detention cannot be passed in such cases.

22. So far as the cases against the detenu are concerned, they have already been registered. They were against persons mentioned therein which is stated in the grounds of detention by the detaining authority. Regarding two statements, having taken into account the law laid down by the Supreme Court in Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740 and reiterated from time to time including the decisions referred to by us hereinabove, the case falls under the maintenance of "law and order" and not "public order". The subjective satisfaction arrived by the detaining authority, therefore, cannot be said to be legal, valid and in accordance with law. Since in the facts and circumstances, an order of detention could have been passed by the detaining authority for maintenance of "public order", the order deserves to be quashed and is hereby set aside. The detenu is ordered to be set at liberty forthwith unless required in any other case. Appeal is accordingly allowed. No order as to costs."

10. Having regard to the facts of the present case, the principles laid down in the above mentioned decision of Ashok Jivraj (supra), are squarely applicable to the facts of the present case. Therefore, the subjective satisfaction arrived at by the detaining authority in respect of disturbance of public order by the alleged activities of the petitioner cannot be said to be legal, valid and in accordance with law. The order under challenge, therefore, is required to be quashed and set aside on this ground alone.

11. In the result, the petition is allowed. The order passed by the District Magistrate, Bhavnagar, on 5th of August, 2004, against the petitioner in exercise

of powers under Section 3(2) of the PASA Act is hereby quashed and set aside. The petitioner - Kalubhai Jodhabhai Khasia is hereby ordered to be set at liberty forthwith if he is not required to be detained in jail for any other purpose. Rule made absolute. DS permitted.

(J.R. Vora, J.)

p.n.nair